Supreme Court, U.S.
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No. 95-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PROPAC-MASS, INC.,

Petitioner,

—v.—

LINDA RUTHARDT, COMMISSIONER OF INSURANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONER

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REASONS FOR GRANTING THE WRIT

I. Because The Supreme Judicial Court of Massachusetts Considered the Merits of Petitioner's Petition for Rehearing and the Petition was Thus Timely Filed under Massachusetts Law, Jurisdiction Properly Lies with this Court

In her opposition to the Petition for Writ of Certiorari of Petitioner, PROPAC-MASS, Inc. ("PROPAC"), Respondent contends that this Court lacks jurisdiction to consider the Petition filed on September 21, 1995, because the Petition was not timely filed. That contention rests on Respondent's argument that the Supreme Judicial Court of Massachusetts did not consider timely filed PROPAC's August 7, 1995, Petition for Rehearing in that court. Respondent contends that the ninety-day period to file a Petition for Writ of Certiorari expired on July 10, 1995—ninety days after the original decision of the court below.

Petitioner counters that the period for review in this Court commenced with the September 7, 1995, denial of Petitioner's Petition for Rehearing in the court below and that the Petition filed by PROPAC on September 21, 1995, was timely filed pursuant to Supreme Court Rule 13.4, which states:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

Respondent's contention rests on the Supreme Judicial Court's August 29, 1995, denial of Petitioner's Motion to Enlarge Time to File Petition for Rehearing and ignores a subsequent Order of the Supreme Judicial Court of September 7, 1995, which stated: "The Petition for Rehearing filed in the above captioned case *has been considered by the court* and

is denied." (Emphasis added). Pet. App. 35a. Under Massachusetts Rule of Appellate Procedure 27(a), a Petition for Rehearing is timely filed if "filed with the clerk of the appellate court within fourteen days after the date of rescript *unless the time is shortened or enlarged by order.*" (Emphasis added).

As PROPAC acknowledged in its Petition, some confusion was engendered by the issuance of seemingly inconsistent orders of the Supreme Judicial Court of Massachuetts. (Pet. at 2) Nevertheless, the Massachusetts court's September 7, 1995, order unambiguously indicates that that court considered the merits of the Petition for Rehearing. Thus, that court must have accepted the filing of the Petition for Rehearing. If the Petition for Rehearing was considered untimely by the Massachusetts court, as contended by Respondent, that court would not have acted at all on the Petition for Rehearing, which would have been rendered moot if the court's first order controlled.

The Supreme Judicial Court's subsequent actions further buttress that conclusion. That court has chosen not to act on Petitioner's Motion for Clarification, finding it moot in light of this Court's docketing of the Petition for Writ of Certiorari. Clearly, the Massachusetts court has acknowledged that jurisdiction is proper in this Court: its determination not to issue an order stating that the Petition for Rehearing was untimely even after it learned that a Petition for Writ of Certiorari had been docketed in this Court can lead to no other conclusion.

Nor was PROPAC's Petition for Rehearing merely a subterfuge designed solely to revive jurisdiction in this Court. Both PROPAC's Motion to Enlarge Time to File Petition for Rehearing (Supplemental App. at 1a) and Motion for Clarification (Supplemental App. at 20a) make clear that PROPAC sought review in Massachusetts because rehearing by the Supreme Judicial Court became the only review possible when PROPAC's initial Petition for Writ of Certiorari to this

Court was filed a day late. In those filings to the Massachusetts court, counsel for PROPAC candidly acknowledged that a second purpose was to provide United States Supreme Court jurisdiction in the event that the Massachusetts court declined to reverse its earlier determination. Nevertheless, the Petition for Rehearing was not a mere sham designed to gain review by this Court; rather, it was a detailed request that the court below reconsider several important issues that Petitioner contends the court overlooked or wrongly decided in its decision of April 11, 1995. (See Petition for Rehearing in Supplemental App. at 7a). The Supreme Judicial Court treated it as such, as revealed by its consideration of the merits of the Petition for Rehearing.

For the above-stated reasons, Petitioner had ninety days from the September 7, 1991, denial of its Petition for Rehearing to file a Petition for Writ of Certiorari to this Court. Petition filed its Petition for Writ of Ceriorari on September 21, 1995. This Court therefore has subject-matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1257(a) (1982).

CONCLUSION

For the above-stated reasons and for the reasons expressed in Petitioner's original Petition for Writ of Certiorari, Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
SUPREME JUDICIAL COURT

Docket No. SJC-06610

PROPAC-MASS, INC.,

Plaintiff-Movant,

—VS.—

COMMISSIONER OF INSURANCE,

Defendant.

MOTION OF PLAINTIFF-MOVANT PROPAC-MASS, INC., FOR LEAVE TO ENLARGE TIME TO FILE PETITION FOR REHEARING

PRELIMINARY STATEMENT

Pursuant to *M.R.A.P.* 14(b), plaintiff-movant PROPAC-MASS, Inc. ("PROPAC"), respectfully moves for leave to enlarge the time to file a *Rule* 27 petition for rehearing of *PROPAC-MASS, Inc. v. Commissioner of Insurance*, No. SJC-06610. As shown below, the facts demonstrate that good cause exists to grant the extension. The rehearing, if granted, will involve consideration of constitutional and other issues not decided by this Court's opinion in the underlying case.

PROCEDURAL HISTORY

This case has its roots in defendant's December 31, 1993, revocation of PROPAC's license to exchange reciprocal contracts of insurance in the State of Massachusetts. PROPAC first received notice of the revocation on January 3, 1993. On an Emergency Motion, Propac petitioned a Single Justice (Lynch, J.) to stay the revocation and to declare it void. The Single Justice denied the petition on March 14, 1995, and entered an Amended Order resolving the merits of the petition on March 29, 1995. PROPAC appealed to this Court, which, on April 11, 1995, decided against PROPAC. Thereafter, PROPAC petitioned to the United States Supreme Court for a writ of certiorari. However, due to counsel's miscalculation of the period for filing the petition on behalf of PROPAC, counsel filed on July 11, 1995, instead on July 10, 1995. That miscalculation by one day prohibits the United States Supreme Court from docketing the petition. Accordingly, PROPAC's sole avenue of relief lies with this Court.

BRIEF STATEMENT OF FACTS

The procedural history of this case may be found in this Court's opinion at 420 Mass. 45, 648 N.E.2d 407 (1995). As noted in that opinion, PROPAC was the licensed attorney-in-fact for the Massachusetts Employers' Insurance Exchange ("MEIE"), a domestic reciprocal insurance exchange. In December 1993, the advisory committee of MEIE sent notice to PROPAC of the termination of its status as attorney-in-fact. That termination was the subject of a separate suit that resulted in Findings of Fact and Conclusions of Law being issued by the Honorable David M. Roseman, J.S.C., on December 30, 1993. On that same day, Propac was called to a meeting with defendant allegedly to discuss the status of an on-going statutory financial examination concerning the Exchange. In fact, the meeting was devoted to a discussion of Judge Roseman's Findings of Fact and Conclusions of Law

and what Propac's intended response to the decision would be. At that meeting, PROPAC's license was never discussed. However, the following day, December 31, 1993, defendant issued a notice revoking PROPAC's license. PROPAC received the revocation notice on January 3, 1994, four days after the revocation became effective.

Pursuant to M.G.L. c. 175, § 5 (1992 ed.) ("section five"), PROPAC petitioned for a stay of that revocation and a declaration that it was void. A Single Justice denied the petition on March 14, 1995, and issued an Amended Order on March 29, 1995. This Court affirmed the Amended Order in its April 11, 1995 decision. It held that the revocation did not require a pre-revocation hearing and that the December 1993 hearing before Judge Roseman, at which PROPAC's license was never at issue, satisfied any due-process concerns. Accordingly, this Court never reached the issue of the constitutionality of section five. Finally, the Court held that section five does not require notice of revocation before the revocation becomes effective.[1]

Those rulings formed the basis of PROPAC's petition to the United States Supreme Court for a writ of certiorari. As noted, counsel for PROPAC miscalculated the period within which it had to file the petition. Counsel filed one day late, and the Clerk of the Court, as required, returned the petition. PROPAC now respectfully moves for leave to extend the time for filing with this Court a Petition for Rehearing Seeking Reconsideration.

LEGAL ARGUMENT

Under *M.R.A.P.* 14(b), an appellate court or single justice "for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may

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[1] In addition, the Court did not address PROPAC's independent argument that the license revocation should be vacated as it resulted from an arbitrary and capricious exercise of power by the Commissioner.

permit an act to be done after the expiration of such time" for a period of up to one year. PROPAC moves pursuant *M.R.A.P.* 14(b) for leave to enlarge the time to file a Petition for Rehearing under *M.R.A.P.* 27.

In respect of procedural matters, a "flexible approach to the rules * * * is particularly appropriate." *Commonwealth v. Hartsgrove*, 407 Mass. 441, 444 (1990). That flexible and liberal approach applies even where time limits are considered jurisdictional. *See Cummings v. City Counsel*, 28 Mass. App. Ct. 345, 348, 551 N.E.2d 46, 49 (App. Ct.) *further appellate review denied*, 407 Mass. 1102, 554 N.E.2d 851 (1990).

A party becomes entitled to *Rule* 14(b) relief on a showing of "good cause" for its non-compliance with the relevant time limitation. *Bernard v. United Brands Co.*, 27 Mass. App. Ct. 415, 418-19 n.8, 538 N.E.2d 1003, 1006 n.8 (App. Ct. 1989) (denying, for reasons of preclusion and for no good cause shown, relief under *M.R.A.P.* 14(b) where application for *M.R.A.P.* 4(c) on *same grounds* had already been denied). "Good cause shown" is a standard substantially similar to *Rule* 4(c)'s "excusable neglect." Case law has interpreted "good cause" to require extraordinary circumstances for relief. *Id.* at 418-19 n.8, 538 N.E.2d at 1006 n.8. In deciding motions under *Rule* 14(b), courts should consider whether the movant's claim is meritorious or substantial, *Tisei v. Building Inspector*, 3 Mass. App. Ct. 377, 379, 330 N.E.2d 488, 489 (App. Ct. 1975), and whether the opposing party can claim material prejudice. *Standard Register Co. v. Bolton-Emerson, Inc.*, 35 Mass. App. Ct. 570, 573, 623 N.E.2d 502, 504 (1993).

In *Stowe v. Bologna*, 32 Mass. App. Ct. 612, 592 N.E.2d 764 (1992), the court granted an enlargement of the time to file a petition for rehearing. The court permitted the enlargement because the decision that formed the basis of the petition to enlarge the time was issued only after the normal time for petitioning had expired, and after the decision had been released, the petitioner had "acted very promptly." *Id.* at 613 n.4, 766 n.4. *Stowe* is much like the instant case. Here,

PROPAC, through its counsel, pursued what it considered to be the best course of action in light of this Court's decision: filing a petition for a writ of certiorari to the United States Supreme Court. As soon as counsel became aware of its time-calculation error, this motion and its accompanying petition for reconsideration were drafted.

Where a client is justified in relying on the actions of the attorney, has acted with due diligence, and is not chargeable with culpable neglect, "justice and equity require presentation of [that client's] claim." *Hastoupis v. Gargas*, 9 Mass. App. Ct. 27, 32, 398 N.E.2d 745, 749 (App. Ct. 1980). Here, PROPAC has done nothing to warrant that its claims not be heard. Accordingly, PROPAC, through its counsel, respectfully requests that this Court grant this motion to allow PROPAC to petition this Court for a rehearing of due-process issues that this Court did not decide in its opinion and that, PROPAC respectfully submits, are essential to the determination of this case. In the alternative, even if this Court grants this motion and thereafter denies PROPAC's petition, that denial would give PROPAC ninety days within which to re-submit its petition to the United States Supreme Court for a writ of certiorari. Either action would permit the adjudication of the merits of PROPAC's due-process claims. Such an adjudication on the merits is exactly the result intended by the rules of appellate procedure. See *supra* at 4. The relief sought by PROPAC—the granting of this motion to enlarge the time to petition for rehearing—does not prejudice any party, nor does it bind this Court to any course of action thereafter. The liberal, flexible approach authorized by the rules of appellate procedure to relieve procedural non-compliance is especially applicable where the fault for procedural non-compliance lies solely with counsel. Any other disposition of this motion would work an undue and inequitable hardship on PROPAC, which bears no blame for the delay in filing. Accordingly, PROPAC, through its counsel, respectfully submits that equity and justice favor the granting of this motion.

CONCLUSION

For the reasons set forth above, plaintiff-movant, PROPAC-MASS, Inc., respectfully requests that this Court grant this motion and enter an Order enlarging the time to file a Petition for Reconsideration.

Respectfully submitted,

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APPENDIX B

[LETTERHEAD]

August 7, 1995

The Honorable Paul J. Liacos
Chief Justice
Supreme Judicial Court of Massachusetts
Suffolk County Court House
Pemberton Square
Boston, Massachusetts 02108

Re: PROPAC-MASS., Inc. v. Linda Ruthardt, Commissioner of Insurance
No. SJC-06610

Dear Chief Justice Liacos:

Please accept this Petition for Rehearing pursuant to R. P. 27 on behalf of plaintiff/appellant PROPAC-MASS, Inc. ("Propac") in connection with the Court's decision, rendered on April 11, 1995, in the above-referenced appeal. A true copy of the Court's opinion, reported at 420 Mass. 45 (1995), is attached hereto as Exhibit A. In that appeal, Propac sought reversal of the revocation by the Commissioner of Insurance of the Commonwealth of Massachusetts of the license that authorized Propac, as the attorney in fact, to execute contracts of reciprocal or inter-insurance for the subscribers of the Massachusetts Employers Insurance Exchange ("the Exchange"), a reciprocal insurance exchange created under the Massachusetts Reciprocal Exchange Law, G.L. c. 175, S 94A-94M (West 1987).

In support of its position that the license revocation should be vacated, Propac argued 1) that the revocation of its license without prior notice and an opportunity to be heard violated its right to due process under the United States and Massachusetts Constitutions; and 2) that the revocation of the license should be set aside because the failure of the Com-

missioner to provide notice and a hearing prior to the revocation was an arbitrary and capricious exercise of power.

Rehearing should be granted so that the Court may reconsider its use of the doctrine of collateral estoppel to conclude that there was no due process violation because Propac had received a hearing on the issue pertinent to the license revocation in a prior contract action in the Massachusetts Superior Court. Propac respectfully submits that the Court's invocation of collateral estoppel was erroneous. Propac further submits that because of its improper reliance on collateral estoppel, the Court erroneously failed to consider the question of whether G.L.c. 175 § 5 ("Section 5") is unconstitutional because it does not require a hearing before a license is revoked pursuant to its provisions. Second, rehearing is warranted because the court failed to consider Propac's independent contention that the license revocation should be set aside because it resulted from the commissioner's arbitrary and capricious exercise of power.

I. THE COURT'S RELIANCE ON THE DOCTRINE OF COLLATERAL ESTOPPEL AND RESULTANT FAILURE TO CONSIDER THE CONSTITUTIONALITY OF G.L.C. 175, § 5 WAS ERRONEOUS

A. The Court Improperly Invoked the Doctrine of Collateral Estoppel.

In its opinion the Court determined that it need not consider whether Section 5, which provides an aggrieved licensee a hearing only after its license has been revoked, meets constitutional due-process requirements. 420 Mass. at 50. That conclusion was based on the Court's determination that Propac had, in the contract action tried in the Superior Court, already had an opportunity to be heard on the issue confronting the Commissioner in connection with the license revocation: whether Propac's continued transaction of business would be hazardous to the public or the subscribers of the Exchange. Thus, the Court held that Propac was barred by

"principles of collateral estoppel" from having a separate hearing on the license revocation issue. Respectfully, that determination was wrong.

The United States Supreme Court has placed strict constitutional limits on the use of collateral estoppel. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). Those limits prohibit issue preclusion unless the party estopped had a full and fair opportunity to litigate the issue and a factual determination against that party had been made.

Contrary to the opinion of the Court, Propac had *no* opportunity to litigate the issue of whether its continued transaction of business was hazardous to the public or the subscribers of the Exchange and *no* determination of that issue was made in the Superior Court. Rather, the Superior Court action involved litigation of an unrelated contract dispute, which included a claim for breach of contract, an alleged violation of the implied covenant of good faith and fair dealing, and an alleged violation of the Massachusetts Unfair Trade Practices Law, G.L. c. 93a. In ruling on those purely contractual issues, the Superior Court never addressed the issue facing the Commissioner regarding the continued licensure of Petitioner as attorney in fact of the Exchange.

Moreover, as is set forth in the statute, and as specifically and repeatedly acknowledged by the trial court itself, the parties to that action, *and representatives of the Division of Insurance*, the issue of the revocation of Propac's license could not have been decided in that forum. See Propac's Reply brief (Exhibit C) at pp. 1 though 5 for a full discussion of the issue. Section 5 provides the only mechanism for revoking the license of an attorney in fact of a reciprocal insurance exchange. That power may be exercised solely by the Commissioner of Insurance and only in the limited circumstances set forth in the statute. Accordingly, because the issue necessary to the license revocation was not and could

not have been litigated in the prior proceeding, Propac was denied a full and fair opportunity to litigate the question whether its continued transaction of business would be hazardous to the public or MEIE's subscribers, and the Court's invocation of the doctrine of collateral estoppel was simply wrong. Because Petitioner was thus denied notice and opportunity to contest the revocation before it took effect, due process was denied.

B. Section 5 Is Unconstitutional Because It Does Not Provide For A Pre-deprivation Hearing.

Section 5 denies entities subject to its provisions due process because it provides for *no* opportunity to contest a license revocation prior to its accomplishment. The United States Supreme Court has described the "central meaning" of procedural due process as follows: " 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223 (1863)). The "root requirement" of due process is that "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The opportunity for a hearing must be given before the deprivation of a property interest "except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371 at 379 (1971); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972) (stating that instances that justify deprivation of protected interest without prior hearing are "rare and extraordinary"). When "protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents, supra*, 408 U.S. at 569-70.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the United States Supreme Court articulated a three-part balancing test

to determine whether government procedures satisfy due process requirements. Under *Mathews*, "the specific dictates of due process" require consideration of

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Supreme Court has held, with few exceptions, that government procedures that afford hearings only *after* the deprivation of a property right violate due process.

At issue in *Fuentes*, *supra*, was the constitutionality of two prejudgment replevin statutes, neither of which provided for notice or an opportunity to be heard prior to the State's seizure of goods. 407 U.S. at 80. Like Section 5, both statutes provided only for post-deprivation hearings. The issue in *Fuentes*, as in this case, was whether procedural due process required an opportunity for a hearing *before* the State seized the property. *Id.* at 80. In holding the statutes unconstitutional, the Court observed that

> [t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional

> and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Id. at 80-81 (citations omitted). Citing its previous "tolerat[ion]" of variances in the *form* of a hearing " 'appropriate to the nature of the case' and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' " *id.* at 82 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Boddie, supra*, 401 U.S. at 378), the Court reiterated its traditional insistence that "whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Id.* at 82 (citing *Bell v. Burson*, 402 U.S. 535, 542 (1971)) (emphasis added) (other citations omitted). The Court further commented on the ineffectiveness of a *post*-deprivation hearing:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Id. at 81-82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1971)); *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985) (requiring hearing prior to for cause dismissal of tenured public employees as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action").

This Court likewise has recognized the primacy of the right to notice and an opportunity to be heard *prior* to the deprivation of a property interest. In *Milligan v. Board of Registration*, 348 Mass. 491 (1965), the Court held, among other things, that procedural due process of law, based on "ordinary concepts of fairness," required that qualified pharmacists who had applied for drug store permits be given an opportunity for a hearing by the Board of Registration in Pharmacy before they could be denied permission to operate drug stores. *Id.* at 499. Like Section 5, the statute did not "expressly require a hearing" in respect of an application for a drug store permit. *Id.* at 495.

In holding that a hearing under the statute was "constitutionally required," 348 Mass. at 500, the Court stated that

> [t]he true principle is that a party who has a sufficient interest . . . at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance where some other interest, such as national security, justifies an overriding of the interest in fair hearing.

Id. at 496 (citation omitted).

Significantly, the *Milligan* Court expressly stated that "the revocation of licenses presents a somewhat analogous problem," and noted that recent decisions in other states had indicated that "a hearing is necessary in such cases." *Id.* at 230 (citing, among others, *Beckler v. Parsekian*, 36 N.J. 242, 256-58, 176 A.2d 470 (1961) (driver's license may not be revoked except by due process and licensee must be fully informed of a charge against him and be afforded fair opportunity to be heard); *State v. Moseng*, 95 N.W.2d 6, 13 (1959) (same); *Wignall v. Fletcher*, 303 N.Y. 435, 439-43 108 N.E.2d 728 (1952) (due process required that driver, whose license was sought to be revoked, be duly informed under what statute he was being proceeded against)).

The foregoing precedents overwhelmingly demonstrate that Section 5 unconstitutionally works a deprivation of property without due process of law insofar as it denies the right to be heard prior to a license revocation. The statute requires only that if the Commissioner is "satisfied" that a company's "condition or management is such as to render its further transaction of business hazardous to the public or its policyholders," the Commissioner must send "written notice . . . specifying the date on which such revocation . . . shall be effective . . . and the ground for such revocation." In addition, Section 5 does not require the Commissioner to make any *findings of fact* concerning that determination.

Section 5 provides for post-revocation review by a Single Justice of the Supreme Judicial Court, who is required "summarily [to] hear and determine the question whether the ground for revocation . . . specified in the notice of the commissioner exists." If the only requirements imposed on the Commissioner are those in Section 5, how a Single Justice can review the Commissioner's action is unclear. Without the benefit of a prior hearing or even a requirement that the Commissioner make findings of fact, the reviewing Justice is required to examine only the Commissioner's blanket statement that a ground for revocation exists. As this Court has noted, "Without findings on all material issues presented by the record, [the] court cannot properly exercise its appellate function." *Smith v. Director of Division of Employment Security*, 376 Mass. 563, 566 (1978). Under Section 5, not only do no findings presented by the record exist—*no record exists*.

Balancing the three interests outlined in *Mathews* compels the conclusion that the procedures afforded under Section 5 are constitutionally defective. First, the significance of Petitioner's private interest in retaining its license—indeed, its means of livelihood—"cannot be gainsaid." *Cleveland Board of Education, supra*, 470 U.S. at 543. Procedural due process requires confrontation and cross-examination of those whose word deprives a person of his or her livelihood. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103 (1963).

As a result of the revocation, Petitioner will be precluded from conducting any insurance-related business in the Commonwealth of Massachusetts without having had any opportunity to contradict its accusers. The ability of its principals to become licensed as attorney in fact for exchanges in other states likewise has been effectively vitiated. The revocation of Petitioner's license, even if ultimately reversed, has irrevocably damaged the reputations of its principals. No demonstrated governmental interest in immediate revocation outweighs those interests. *See Greene v. McElroy*, 360 U.S. 474 (1959) (finding that revocation of security clearance effectively disqualified aeronautical engineer from future work in his entire field and therefore entitled him to predeprivation hearing). As in *Greene*, the Commissioner's action in this case has extinguished the employment prospects of Petitioner's principals, both of whom have dedicated the majority of their professional lives to the insurance industry. The facts cannot be stated more simply: the Commissioner took Petitioner's means of livelihood and, *without compensation*, gave it to someone else.

Second, consideration of the "factor that calls most strongly for a pre-enforcement hearing"—the risk of an erroneous deprivation of property and the probable value of additional or substitute procedural safeguards—demonstrates that Petitioner was entitled to a prior hearing. *See Application of United States*, 610 F.2d 1148, 1157 (3d Cir. 1979). As outlined above, the risk of an erroneous deprivation of property is extreme if the Commissioner is not required to create any record, make any findings of fact, or allow the company whose license is to be revoked a chance to address the charges or offer evidence to rebut those charges.

Equally significant is the undeniable circumstance that the requirement of a prior hearing carries no severe burden for the Division of Insurance. Indeed, the public interest is best served in such a case by requiring a preliminary public hearing. A determination concerning the license of the attorney in fact of an exchange not only affects the licensee, but also has

a *substantial* impact on the exchange's subscribers. The interests of the more than 800 subscribers would best have been served by ensuring that a revocation of Petitioner's license was based on correct determinations of fact and reasoned conclusions concerning the danger, if any, involved in PROPAC's continued transaction of business. Any purported interest in immediate revocation cannot and does not outweigh the obvious interest of the subscribers in being fully informed on issues of critical importance to at least the perceived effect of the displacement of their Attorney in Fact on their continued insurance coverage. Providing a hearing would have afforded the requisite assurance and would have imposed neither a significant administrative burden nor an intolerable delay.

Finally, the government interests involved do not justify dispensing with the prior-hearing requirement. Petitioner recognizes that the Division has an interest in protecting the public from practices of a foreign insurance company, to which it may not have immediate access, that appear contrary to the public good. Foreign insurance companies "as distinguished from domestic companies generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 585 (1935). That interest, however, is simply not implicated with a domestic exchange and is not served by arbitrary and uninformed actions by the Commissioner. In fact, that interest is severely jeopardized when a government official takes action of the kind taken in the present case.

Scrutiny of Section 5 under *Mathews* and the other applicable precedents reveals its constitutional invalidity as it applies to the attorney in fact of a domestic insurance exchange such as Petitioner. The post-revocation hearing does not provide for an opportunity to be heard at a meaningful time and in a meaningful manner. The government's interest in immediate revocation does not outweigh the "obvious value in reaching an accurate decision." *Cleveland Board of Education, supra*, 470 U.S. at 543. As was noted in that case,

"Even where the facts are clear, the appropriateness or necessity of the [revocation] may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be *before* the termination takes effect." *Id.* (emphasis added). Because the statute provides for no such opportunity, the statute should be stricken.

II. THE REVOCATION OF PROPAC'S LICENSE MUST BE SET ASIDE BECAUSE THE FAILURE OF THE COMMISSIONER TO PROVIDE NOTICE AND A HEARING PRIOR TO THE REVOCATION WAS AN ARBITRARY AND CAPRICIOUS EXERCISE OF POWER

In its opinion the Court did not address Propac's independent argument that the license revocation should be vacated because it resulted from an arbitrary and capricious exercise of power by the Commissioner. Rehearing should be granted to permit a ruling on that issue.

It is well settled that licensing authorities act "in a quasi-judicial capacity when revoking licenses" pursuant to Massachusetts law and "may not act unreasonably or arbitrarily" toward that end. *Konstantopoulos v. Town of Whately*, 384 Mass. 123, 131-32 (1981). Fulfillment of the "quasi-judicial" function "requires that formal notice be given a licensee that adverse action is contemplated, and that an opportunity to respond to and contest the action be afforded." *Id.*

The Commissioner's failure to provide notice to PROPAC before revoking its license was an arbitrary and capricious abuse of discretion. The truly willful nature of the Commissioner's act is manifested in the undisputed fact that on the day before the license revocation became effective—the same day the "Notice" was issued—the Commissioner had the opportunity to inform PROPAC of the impending revocation in person and afford it some sort of opportunity to respond. The Commissioner failed to do so, deliberately concealed the fact that she was contemplating revocation, and the next day revoked the license with no advance notice to PROPAC. As

noted in the original brief filed in support of the appeal at 54-56 (Exhibit B), PROPAC did not become aware of the revocation until three days later. The Commissioner's action was not only constitutionally defective, but was an arbitrary and capricious exercise of her powers that prejudiced PROPAC's substantial rights.

The Commissioner's failure to conduct a hearing prior to exercising the quasi-judicial act of revoking PROPAC's license likewise constituted an abuse of discretion. This Court has consistently held that the government's failure to conduct a hearing and make reasonable findings based on evidence submitted by both the complaining and responding parties is an arbitrary and capricious exercise of power, warranting reversal. *American Employers Insurance Co. v. Commissioner of Insurance*, 298 Mass. 161, 166 (1937) ('[T]he provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced *or to make an essential finding without supporting evidence is arbitrary action.*') (quoting *Baltimore and Ohio Railroad v. United States*, 264 U.S. 258, 264 (1924), and *Morgan v. United States*, 298 U.S. 468 (1936)); *see also Woodbury v. Municipal Council*, 318 Mass. 385 (1945) (holding that action of municipal council in revoking plaintiff's license when no grounds were demonstrated at the hearing "an arbitrary, capricious and unreasonable exercise of power"); *accord Massachusetts General Hospital v. Commissioner of Public Welfare*, 350 Mass. 712, 720 (1966) (referees's decision denying compensation to hospital for portion of medical care of recipients of old age and disability assistance was without evidential support and was therefore arbitrary and capricious).

These cases demonstrate this Court's requirement that "essential findings" by an administrative officer must have evidential support adduced in a hearing that permits, indeed requires, the introduction of evidence by both sides. The Commissioner's revocation of PROPAC's license was arbitrary and capricious as there was no hearing permitting both

parties to introduce and scrutinize evidence. Thus, there was no guarantee that the Commissioner's decision was "uninfluenced by extraneous considerations." *Morgan*, 298 U.S. 468, 480 (1936). It must be set aside.

For all the reasons set forth above, Propac respectfully requests that rehearing be granted and that the license revocation be vacated.

Respectfully submitted,

McElroy, Deutsch & Mulvaney

Edward B. Deutsch

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
SUPREME JUDICIAL COURT

Docket No. SJC-06610

PROPAC-MASS, INC.,

Plaintiff-Movant,

—VS.—

COMMISSIONER OF INSURANCE,

Defendant-Respondent.

MOTION FOR CLARIFICATION

PRELIMINARY STATEMENT

Plaintiff-movant, PROPAC-MASS, Inc. ("PROPAC"), respectfully moves for clarification of two seemingly-inconsistent docket entries concerning PROPAC's Petition for Rehearing in the above matter. On August 10, 1995, PROPAC simultaneously filed (1) a Motion to Enlarge Time for Filing of Petition for Rehearing and (2) a Petition for Rehearing. PROPAC received a notice that on September 7, 1995, the Supreme Judicial Court had considered PROPAC's Petition for Rehearing and denied that Petition. A copy of the September 7, 1995, notice is attached hereto as Exhibit A. That notice makes clear that this Court had in fact reviewed the merits of PROPAC's appeal.

PROPAC has filed this Motion for Clarification because of another notice received shortly before the September 7, 1995, notice. The first notice, dated August 29, 1995, indicated that the Court had denied PROPAC's Motion to Enlarge Time to File Petition for Rehearing. A copy of that notice is attached hereto as Exhibit B. Given the Court's later action on the Petition, the earlier notice appears to be in error, or, in the alternative, rendered moot by the Court's subsequent determination to act on the Petition for Rehearing.

PROPAC seeks clarification because the determination of which entry is correct controls the issue whether the time period for the filing of a petition for writ of certiorari to United States Supreme Court has expired. Specifically, PROPAC urges that inasmuch as this Court did in fact consider and rule on the Petition for Rehearing, that decision (on the merits) should be the dispositive one, and the Court should amend its docket to reflect the granting of PROPAC's Motion for an Enlargement of Time to File its Petition for Rehearing.

PROCEDURAL HISTORY

This case has its roots in defendant's December 31, 1993, revocation of PROPAC's license to exchange reciprocal contracts of insurance in the Commonwealth of Massachusetts. PROPAC first received notice of the revocation on January 3, 1993. On an Emergency Motion, Propac petitioned a Single Justice (Lynch, J.) to stay the revocation and to declare it void. The Single Justice denied the petition on March 14, 1995, and entered an Amended Order resolving the merits of the petition on March 29, 1995. PROPAC appealed to this Court, which on April 11, 1995, decided against PROPAC.

Thereafter, PROPAC petitioned to the United States Supreme Court for a writ of certiorari. However, due to counsel's miscalculation of the period for filing the petition on behalf of PROPAC, counsel filed on July 11, 1995, instead on July 10, 1995, the last day for filing of that petition. That mis-

calculation by one day prohibited the United States Supreme Court from docketing the petition.

Because the sole review available due to that miscalculation was by way of a Petition for Rehearing directed to this Court, PROPAC filed such a Petition on August 10, 1995. Because M.R.A.P. 27 provides that the time for filing such a petition is fourteen days unless that time period is expanded or reduced by the Court, PROPAC simultaneously moved for an enlargement of time for the filing of the Petition for Rehearing.

PROPAC has received two inconsistent notices concerning its Petition for Rehearing. The first is notice of a docket entry on August 29, 1995, which stated:

> Please take note that on August 10, 1995, the following entry was made on the docket of the above-referenced case:
>
> MOTION of Plaintiff-Movant PROPAC-MASS, Inc. for Leave to Enlarge Time to File Petition for Rehearing filed. August 29, 1995: Denied by the Court. Notice to Counsel.

PROPAC thereafter received a Notice of Denial of Petition for Rehearing that indicates that on September 7, 1995, "The petition for Rehearing filed in the above case *has been considered by the court* and is denied." (Emphasis added).

BRIEF STATEMENT OF FACTS

This case involves the Commissioner of Insurance's December 31, 1993, revocation of PROPAC's license to exchange contracts of interinsurance on behalf of the Subscribers of the Massachusetts Employers Insurance Exchange. Pursuant to M.G.L. c. 175, § 5 (1992 ed.) ("section five"), PROPAC petitioned for a stay of that revocation and a declaration that it was void. A Single Justice denied the petition on March 14, 1995, and issued an Amended Order on

March 29, 1995. This Court affirmed the Amended Order in its April 11, 1995, decision. It held that the revocation did not require a pre-revocation hearing and that the December 1993 hearing before Judge Roseman, at which PROPAC's license was never at issue, satisfied any due-process concerns. Accordingly, this Court never reached the issue of the constitutionality of section five. Finally, the Court held that section five does not require notice of revocation before the revocation becomes effective. PROPAC's Petition for Rehearing asked that the Court reconsider the above issue, as well as PROPAC's contention that the Commissioner's action was an arbitrary and capricious exercise of power.

PROPAC requests clarification regarding the Court's orders of August 29, 1995, and September 7, 1995. Specifically, PROPAC asks that the Court amend the docket for this case to show that this Court has in fact accepted the filing of the Petition for Rehearing, considered that Petition on its merits, and denied that Petition. PROPAC seeks clarification because the resolution of the apparent conflict between those entries is essential to the determination whether the time period for the filing of a Petition for Writ of Certiorari regarding the revocation of PROPAC's license has expired. The United States Supreme Court Rules provide that the time for filing for a writ is ninety days from the date of judgment in the matter below or ninety days from the denial of a petition for rehearing. Plaintiff-movant's position is that this Court's consideration and denial of PROPAC's Petition for Rehearing would allow PROPAC to seek review in the United States Supreme Court.

To protect PROPAC's interests, its counsel has already filed a new petition for writ of certiorari. Nevertheless, that filing recognizes the apparent conflict between the docket entries of August 29, 1995, and September 7, 1995, and includes both docket entries in the appendix to the petition. PROPAC has indicated to the United States Supreme Court that it is seeking clarification from this Court. As a first step in that process, PROPAC's counsel, Edward B. Deutsch, of McElroy,

Deutsch & Mulvaney, Morristown, New Jersey, and Raymond R. Kenney, of Martin, Magnuson, McCarthy & Kenney, Boston, Massachusetts, personally met with Jean M. Kennett, Clerk of this Court, on Friday, September 22, 1995. Ms. Kennett indicated that PROPAC would need to file a Motion for Clarification to secure from the Court its resolution of the seeming conflict between the two docket entries.

LEGAL ARGUMENT

PROPAC respectfully requests that this Court amend the docket regarding this matter to reflect the fact that this Court accepted the filing of PROPAC's Petition for Rehearing, considered the merits of the Petition, and denied it. As the September 7, 1995, docket entry makes clear, this Court in fact revisited the substantive issues involved when it considered and denied the Petition. Given that fact and recognizing that the ninety-day jurisdictional period for filing a petition for a writ of certiorari to the United States Supreme Court is intended to run from the last date that a lower court acted on the merits of an action, that this Court acknowledge that it did reconsider the merits of PROPAC's appeal on September 7, 1995—and thus triggered a ninety-day period for filing for review by the Supreme Court—appears to be the proper resolution of the conflicting orders and a triumph of substance over form.

Fairness to the innocent client, PROPAC, counsels a similar resolution by this Court. The loss of the right to Supreme Court review was occasioned by a simple, albeit disastrous, error by PROPAC's counsel. Thus, PROPAC was left without the possibility of further review and without a right to seek an adjudication of the constitutionality of M.G.L. c. 175 § 5 unless this Court agreed to consider the Petition for Rehearing. Thus, grounds certainly existed for the granting of PROPAC's motion to file its petition for rehearing beyond the usual fourteen-day period. Under *M.R.A.P.* 14(b), an appellate court or single justice "for good cause shown may upon

motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time" for a period of up to one year.

A party becomes entitled to *Rule* 14(b) relief on a showing of "good cause" for its non-compliance with the relevant time limitation. *Bernard v. United Brands Co.*, 27 Mass. App. Ct. 415, 418-19 n.8, 538 N.E.2d 1003, 1006 n.8 (App. Ct. 1989) (denying, for reasons of preclusion and for no good cause shown, relief under *M.R.A.P.* 14(b) where application for *M.R.A.P.* 4(c) on *same grounds* had already been denied). "Good cause shown" is a standard substantially similar to *Rule* 4(c)'s "excusable neglect." In *Stowe v. Bologna*, 32 Mass. App. Ct. 612, 592 N.E.2d 764 (1992), the court granted an enlargement of the time to file a petition for rehearing. The court permitted the enlargement because the decision that formed the basis of the petition to enlarge the time was issued only after the normal time for petitioning had expired, and because after the decision had been released, the petitioner had "acted very promptly." *Id.* at 613 n.4, 572 N.E. 2d at 766 n.4. *Stowe* is much like the instant case. Here, PROPAC, through its counsel, pursued what it considered to be the best course of action in light of this Court's decision: filing a petition for a writ of certiorari to the United States Supreme Court. As soon as counsel became aware of its time-calculation error, it filed a Petition for Rehearing and a Motion for Enlargement of Time for Filing of Petition for Rehearing.

If a client is justified in relying on the actions of the attorney, has acted with due diligence, and is not chargeable with culpable neglect, "justice and equity require presentation of [that client's] claim." *Hastoupis v. Gargas*, 9 Mass. App. Ct. 27, 32, 398 N.E.2d 745, 749 (App. Ct. 1980). Here, PROPAC has done nothing to warrant a denial of a hearing on its claims. Accordingly, PROPAC, through its counsel, respectfully requests that this Court amend the docket to reflect the acceptance of the filing of the Petition for Rehearing beyond the usual fourteen-day period. Moreover, such an entry accurately reflects what has transpired. This Court, by its action

of September 7, 1995, has indeed issued a determination regarding the substance of PROPAC's claim.

The liberal, flexible approach authorized by the rules of appellate procedure to relieve procedural non-compliance is especially appropriate where the fault for procedural non-compliance lies solely with counsel. Any other disposition of this motion would work an undue and inequitable hardship on PROPAC, which bears no blame for the delay in filing. Accordingly, PROPAC, through its counsel, respectfully submits that the interests of accuracy, equity, and justice favor the amendment of the docket to reflect the granting of PROPAC's Motion for Enlargement of Time for Filing of Petition for Rehearing. That disposition would remove any uncertainty regarding PROPAC's entitlement to petition for review by the United States Supreme Court within ninety days of September 7, 1995.

CONCLUSION

For the reasons set forth above, plaintiff-movant, PROPAC-MASS, Inc., respectfully requests that this Court grant this motion and enter an Order amending the docket as requested.

Respectfully submitted,

/s/ EDWARD B. DEUTSCH
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